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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-456

HIPOLITO MARTINEZ-MARTINEZ,
Petitioner,

versus

THE IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARMENDARIZ & ARMENDARIZ
609 Myrtle
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ATTORNEYS FOR PETITIONER

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Hipolito Martinez-Martinez, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on the 11th day of June, 1973.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit affirming the judgment of the Board of Immi-

gration Appeals is not yet reported. The opinion is set out in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 11, 1973. The jurisdiction of the Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

I. Whether the deportation order is supported by clear, unequivocal, and convincing evidence.

II. Whether the deportation of Petitioner violates the Fourteenth Amendment rights of citizenship of his United States citizen children.

III. Whether the deportation of Petitioner violates the guarantee of due process of law of the Fifth Amendment insofar as the result of that deportation would be to destroy the family bond between Petitioner and his American citizen children.

STATUTES INVOLVED

Section 241(a)(13) of the Immigration and Nationality Act, 8 U.S.C. §1251(a)(13), reads as follows:

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who —

> (13) . . . prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;"

STATEMENT OF THE CASE

Petitioner is a native of Mexico who was granted a permanent resident visa in June of 1966, and has resided in the United States since that time. He is married to an American citizen, and has two children, both of whom were born in the United States.

Petitioner was charged with deportability on the basis that he knowingly and for gain assisted another to enter the United States illegally. A deportation order was enter by the Special Inquiry Officer on January 27, 1972. Petitioner appealed to the Board of Immigration Appeals, and the deportation order was affirmed on November 20, 1972. Petitioner's motion for reconsideration was overruled on January 16, 1973. Petitioner then filed a petition for review in the United States Court of Appeals for the Fifth Circuit, which affirmed the order of deportation on June 11, 1973. The case is before the Court on a petition for Writ of Certiorari from that judgment.

REASONS FOR GRANTING THIS WRIT

I. The Court Of Appeals Erred In Affirming The Deportation Order For The Reason That The Evidence Submitted By The Government In Support Of Such Order Was Not Sufficiently Clear, Convincing, And Unequivocal To Support Deportation.

Argument

The burden in a deportation proceeding is upon the government to establish the deportability of the individual by clear, convincing and unequivocal evidence. WOODBY v. I.N.S., 385 U.S. 276 (1966).

The charge of deportability lodged against Petitioner in this case was as follows:

> "Section 241(a)(13) of the Immigration and Nationality Act, in that, within 5 years after entry you knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law."

Thus, in order to have established the deportability of Petitioner, the government must have proved not only that he assisted another to enter illegally, but further that he did so for gain. It is urged that it was not proven by clear, convincing and unequivocal evidence that what Petitioner did he did for gain.

Petitioner testified at his deportation hearing that the assistance rendered the five illegal aliens in question was done for friendship, and not for remuneration. He testified as to his friendship with relatives of the aliens in Chicago, Illinois, and testifed that all sums of money given to him by the aliens were given to him for the purpose of paying for their airplane fare, and that he returned all sums of money to them, except the amount he had spent for taxi fare in their behalf. (R. 134-135)

The government attempted to establish that such assistance had been rendered by Petitioner for gain through the testimony of five witnesses. It is urged that such testimony is frought with inconsistencies to the extent that it falls short of the standard of clear, convincing and unequivocal evidence.

According to the testimony of Belino Soto Hurtado given in his statement of November 17, 1970 (R. 145), all of the aliens met together with Petitioner at a motel in Juarez, Mexico, where the financial arrangements and transactions are purported to have taken place. Yet they all gave varying versions of the amounts requested and paid.

Francisco Mejorado Ramirez testified at the deportation hearing that he gave Petitioner that sum of One Hundred and Forty Dollars ($140.00) (R. 43, line 20). Yet, in his statement to the immigration inspector, he stated that he had paid Petitioner One Hundred and Fifty dollars ($150.00) (R. 143). Belino Soto Hurtado testified in his statement that he paid Petitioner

One Hundred and Seventy Dollars ($170.00), and that Twenty Dollars ($20.00) of that sum was for his uncle, Pedro Soto. (R. 145).

Pedro Soto Mejorado testified in his statement that the price was to be Two Hundred and Seventy-Five Dollars ($275.00); and that upon meeting with Petitioner at the hotel he paid Petitioner One Hundred and Twenty Dollars ($120.00). (R. 149). He further stated that he was to pay Petitioner an additional One Hundred and Sixty-Five Dollars ($165.00) after obtaining work in Chicago, which would make the total Two Hundred and Eighty-Five Dollars ($285.00), or Three Hundred and Five Dollars ($305.00) if his nephew's testimony concerning the additional Twenty dollars ($20.00) is correct. At the deportation hearing, however, he testified that he gave Petitioner One Hundred and Forty dollars ($140.00). (R. 101, lines 9-10).

Incarnacion Rodriguez Sota testified at the hearing that he did not give Petitioner any money. (R. 89, line 12).

Guadalupe Nunez Ramos testified that the stated price was Two Hundred Dollars ($200.00) to Two Hundred and Fifty Dollars ($250.00) (R. 110-111, lines 26, 1). Later, he said the stated price was Two Hundred and Fifty Dollars ($250.00), Two Hundred Dollars ($200.00), or One Hundred and Fifty Dollars ($150.00). (R. 120, line 5). Yet he stated that Petitioner agreed to the sum of one hundred and fifty dollars ($150.00), but that he paid Petitioner only one hundred and thirty five dollars ($135.00). (R. 120, line 6; 111, line 3).

Thus, as to the price, we have Francisco Mejorado Ramirez' statement that the price was one hundred and fifty dollars ($150.00) (R. 43, line 18); Belino Soto Hurtado's statement that the price was one hundred and fifty dollars ($150.00) (R. 145); Pedro Soto Mejorado's first statement that the price was two hundred and seventy five dollars ($275.00), and thereafter, through addition of the amount paid and the amount stated to be owed, either two hundred and eighty five dollars ($285.00) or three hundred and five dollars ($305.00) (R. 149); Incarnacion Rodriguez Soto's statement that he paid nothing; Guadalupe Nunez Ramos' statement that the price was one hundred and fifty dollars ($150.00) or two hundred dollars ($200.00) or two hundred and fifty dollars ($250.00), but for him was one hundred and fifty dollars ($150.00). Yet all of these arrangements and transactions, at least as to four of the witnesses, were suppose to have taken place at the same time and at the same place. (R. 104, lines 3-6).

As to the amounts paid, Francisco Mejorado Ramírez purportedly paid either one hundred and forty dollars ($140.00) or one hundred and fifty dollars ($150.00), depending on which of the statements is to be believed; Belino Soto Hurtado paid one hundred and seventy dollars ($170.00), twenty dollars ($20.00) which was for his uncle, Pedro Soto Mejorado, who paid one hundred and twenty dollars ($120.00); Incarnacion Rodriguez Soto paid nothing; Guadalupe Nunez Ramos paid one hundred and thirty five dollars ($135.00). Again, this is suppose to have taken place all in the same room.

In addition, there were other conflicts in the testimony of the witnesses which render their testimony at least suspect. For example, Incarnacion Rodriguez Soto testified that they were guided across the border by a certain girl, who then took them to a restaurant here in the United States where they all ate breakfast, and then accompanied them to a hotel, where she made the arrangements for rooms for them. (R. 94, lines 1-10). Pedro Soto Mejorado, however, testified that the girl did not accompany them to the hotel. (R. 107, lines 10-12).

Incarnacion Rodriguez Soto also testified that after they all caught a taxi in Juarez, Mexico, Petitioner rode in the taxi with them. He first testified that Petitioner rode with them all the way to the "black bridge", where they crossed the border; and there after he testified that Petitioner got out of the cab some distance from the bridge. (R. 92, lines 15-17). Guadalupe Nunez Ramos, on the other hand, testified that Petitioner accompanied them to the "black bridge". (R. 112, line 6). Later, this same witness admitted to having lied about the point where the border was crossed, and admitted that they did not cross over the "black bridge" at all. (R. 117, lines 2-8).

These inconsistencies and conflicts are especially important in view of other circumstances and evidence which tend to explain their existence. Firstly, the five witnesses were incarcerated as witnesses against Petitioner. They were told by immigration officials that they would not gain their freedom until after they had testified against Petitioner. (R. 64, lines 7-11). They

consulted an attorney to attempt to secure their release from jail, but this was unsuccessful. (R. 69, lines 21-26).

In addition, all of the five witnesses had relatives in Chicago, Illinois Who had encouraged and assisted their illegal entry into the United States, and whom they were obviously attempting to protect. Thus, Francisco Mejorado Ramirez has a brother by the name of Froilan Mejorado living in Chicago, who sent him the money with which to make the journey. Froilan Mejorado wrote to Francisco Mejorado Ramirez and Belino Soto Hurtado and Guadalupe Nunez Ramos urging them to come to Chicago. (R. 47, lines 20-25).

Belino Soto Hurtado, the nephew of the other witness, Pedro Soto Mejorado, has an uncle by the name of Agustin Soto in Chicago. (R. 76, lines 19-20).

Agustin Soto is the brother of Pedro Soto Mejorado. (R. 102, lines 9-11). He is also acquainted with Froilan Mejorado. (R. 9-10). Guadalupe Nunez Ramos is a distant relative of Agustin Soto, and he is also acquainted with Froilan Mejorado. (R. 119, lines 1-7). He testified as to an arrangement among the men. (R. 144, lines (2-11). Incarnacion Rodriguez Soto also has a brother in Chicago who sent him the money with which to travel to Chicago. (R. 84, lines 4-9).

The following testimony of Francisco Mejorado Ramirez makes it abundantly clear that these witnesses were highly concerned with protecting their relatives in Chicago in these proceedings:

Q Now, you have ... you have a ... somebody that is family in Chicago, do you not?

A No, sir.

Q You deny that Froilan Mejorado is living in Chicago and is related to you in some way?

A The man says that he is there; he is a brother of mine.

Q You do have a brother by the name of Froilan Mejorado who is in the United States of America. Is that correct?

A Yes, sir.

Q And it was Froilan Mejorado who wrote to you three to come to Chicago and sent you the money. Isn't that correct?

A Yes, sir.

Q Now, is Froilan Mejorado, your brother, a legal resident alien or is he illegally here too?

A He is here illegally.

Q After all of this testimony you gave to your ... to the Immigration Office was to protect your brother in Chicago, wasn't it?

A Like what?

Q Well, you didn't mention your brother in Chicago to the Immigration, did you?

A Exactly. I have not mentioned him for anything.

Q You didn't tell the Immigration that you had made a long distance call to your brother, did you?

A No, sir.

Q You didn't tell the Immigration that your brother was illegally in this country to-

gether with a fellow by the name of Agustin Soto and living in the Chicago area, did you?

A No, sir.

Q You didn't tell the Immigration that it was your brother who is illegally in this country that sent you the money and gave you the idea to come into the United States illegally, did you sir?

A No, sir.

Q You didn't tell the Immigration that it was your brother who told you this young man would be here to deliver some money for a funeral and that he might help you. Is that correct?

A No, sir.

Q But that is true. Your brother did tell you that?

A Yes, sir.

Q Now, all that you've done then, all that you fellows have done has been to protect Agustin Soto and your brother. Isn't that correct?

A Well, yes. I had been saying absolutely nothing about my brother or who had given me the money.

Q But your statements were made in order to protect your brother. Isn't that correct?

A Yes; I have not mentioned him for anything."

(R. 47, lines 14-26;
R. 48, lines 1-2;
R. 56, lines 13-26;
R. 57, lines 1-16)

Under these circumstances, the conflicting, inconsistent testimony of the witnesses is simply not of such character as would be sufficient to establish the element of gain in a clear, convincing and unequivocal manner. This is especially true in view of the fact of other evidence in the record squarely supports Petitioner's position that any funds turned over to him by the witnesses were returned.

Petitioner's Jencks Act motion for discovery produced the apprehension reports of only two of the five witnesses. Such reports concerning the other three witnesses were never produced. However, those two apprehension reports clearly reflect the truth of Petitioner's testimony.

The apprehension report concerning Francisco Mejorado Ramirez shows that he had Sixty-two United States dollars ($62.00) on his person at the time of his arrest. (R. 143). Mejorado Ramirez testified that he gave Petitioner the sum of One Hundred and Forty Dollars ($140.00) (R. 43, line 20), and he acknowledged that the sum of Eighty Dollars ($80.00) was returned to him. (R. 50, lines 21-24). The total of the sum that he acknowledged was returned to him and the sum he had in his possession at the time of his arrest is almost precisely the amount he claims to have paid Petitioner.

Similarly, Belino Soto Hurtado testified that he left his hometown with the sum of Two Hundred and Four Dollars ($204.00). (R. 76, lines 25-26; R. 77, lines 1-10). His apprehension report (R. 147) shows that at the

time of his arrest he had One Hundred and Seventy Dollars ($170.00), together with Seventy pesos. The special inquiry officer took administrative notice that one Mexican peso is the equivalent of eight cents in United States currency (R. 77, lines 2-5), such that he had a total of One Hundred and Seventy-five Dollars and Sixty Cents ($175.60) on his person at the time of his arrest. How is this possible if he left his home with Two Hundred and Four Dollars ($204.00), and gave One Hundred and Seventy Dollars ($170.00) of that to Petitioner? Clearly, at the time of his arrest, he had all of his money, less Twenty-Eight Dollars and Forty Cents ($28.40), which is very reasonable to assume he spent on the journey from his hometown to Juarez, Mexico. As stated above, Petitioner's motion produced only two of the apprehension reports of the five witnesses, but those bear out Petitioner's testimony. In light of this fact, and in view of the highly conflicting and incongruous nature of the testimony of the five witnesses, and in further light of the circumstances revealed in the record illustrating a motive for the witnesses to give incorrect testimony, the evidence simply does not support a finding that what Petitioner did he did for gain, and therefore does not support an order of deportation.

II. The Court Of Appeals Erred In Affirming The Deportation Order For The Reason That Deporting Petitioner Will Deprive His American-Born Children Of Their Right To Citizenship Granted By The Fourteenth Amendment To The United States Constitution.

Argument

Petitioner is married to an American citizen and has American-born children. The question here is whether the government may do indirectly what it may not do directly — banish a United States citizen child by deporting his sole means of support, his father.

It is beyond dispute that the right to reside in this country is inherent in the rights of citizenship. It is equally beyond dispute that the effect of deporting the father of dependent minor children is to deport those children.

Thus, the rights urged here are, in effect, the rights of the minor American citizen children of Petitioner. They are urged here for the reason that the children themselves have no method of raising these issues, other than before this Court. They are not entitled to be independently represented at a deportation hearing, *Application of Amoury*, 307 F. Supp. 213 (S.D.N.Y. 1969).

For Petitioner's children, being forced to leave this country at this early age will seriously jeopardize their future as full participants in American society.

In the first place, they will grow up with a foreign language. Without a knowledge of English, it will be highly difficult for them to return to this country and succeed economically. Congress itself has recognized the importance of proficiency in English to the citizens of this country by making knowledge of English a condition of naturalization. 8 U.S.C. §1423(1). For an ex-

ample of what could face Petitioner's children see *Gonzales-Gomez v. INS*, 450 F.2d 103 (9th Cir. 1971) where a young man with derivative citizenship from his mother came very close to losing his citizenship status because of his illiteracy in English.

Secondly, the problems involved in becoming acculturated to a new society may render it impossible for Petitioner's children to ever resume the benefits of their citizenship. It has been the pattern in the history of this nation that the first generation immigrant faces many problems in employment and social interaction that are not encountered by later generations. See Wheeler, Thomas, *The Immigrant Experience, The Anguish of Becoming American*, (1971). This is especially true for persons who immigrate from Mexico, insofar as even second and third generation citizens of Mexican descent face difficult social conditions, including discrimination in education, employment and voting rights. See Grebler, Moore, Guzman, *The Mexican American People, (1970)*; *Hernandez v. Texas*, 347 U.S. 475 (1954); *Cisneros v. Corpus Christi ISD*, 467 F.2d (5th Cir. 1972); *Graves v. Barnes*, 343 F.Supp. 704, 727 (W.D.Tex.1972); United States Civil Rights Commission, *The Administration of Justice and the Mexican-American*, 1970.

In addition, there is the problem of being "reared, at best, in an atmosphere of divided loyalty." *Rogers v. Bellei*, 401 U.S. 815, 832 (1971). As was stated by this Court in *Kawakita v. United States*, 343 U.S. 717, 733 (1952), "one who has a dual nationality will be subject to claims from both nations, claims which at times may be competing and conflicting."

These are but a few of the many problems standing in the way of Petitioner's children's resumption of their citizenship status — not the least of which are the practical problems involving in uprooting themselves at sometime in the future and changing their domicile and their lives to take up residence again in this country.

This Court has recognized such difficulties, and has placed an extremely high value on the right of citizenship. Thus, in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159, 160 (1963):

> "Citizenship is a most precious right. It is expressly guaranteed by the Fourteenth Amendment of the Constitution, which speaks in the most positive terms ... Deprivation of citizenship — particularly American citizenship which is 'one of the most valuable rights in the world today' ... has grave practical consequences."

And in *Schneiderman v. United States*, 320 U.S. 118, 122 (1943):

> ". . . It is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized man."

In further recognition of the high value of American citizenship, this Court has held that Congress may not deprive Fourteenth Amendment citizens of such citizenship without a voluntary renunciation, *Schneider v. Rusk*, 377 U.S. 163 (1965), *Afroyim v. Rusk*, 387 U.S. 153 (1967). The Court stated in *Afroyim*, 387 U.S. at 262, as follows:

> "Once acquired this Fourteenth Amendment citizenship was not to be shifted, cancelled, or diluted at the will of the Federal Government, the state or any other governmental unit."

Although the rights incident to citizenship have never fully been articulated, there can be little doubt that a Fourteenth Amendment United States citizen cannot constitutionally be exiled or banished. *United States ex rel v. Masucci v. Follette*, 272 F.Supp. 563 (S.D.N.Y. 1967).

Under the Immigration and Nationality Act, only aliens are deportable, 8 U.S.C. § 1251.

In light of all this, can the government deport a United States citizen's child by deporting his alien father? It is urged that it may not. The government's interest in deporting Petitioner is greatly out weighed by the interest of the Petitioner's American citizen children in retaining their status and rights as American citizens.

III. The Court Of Appeals Erred In Affirming The Deportation Order For The Reason That Deportation Of Petitioner Violates The Guarantee Of Due Process Of Law Of The Fifth Amendment Insofar As It Destroys The Family Bond Between Petitioner And His Children.

Argument

For Petitioner's children, the alternative to exile is for them and their mother to be left behind by their father. This will have the inevitable result of destroying the family bond between Petitioner and his family. It is urged here that such family bond is protected by the due process clause of the Fifth Amendment even in the face of the United States immigration laws.

The policy of American jurisprudence has always been to encourage and support family unity and relationship. The doctrine of parental tort immunity was originally founded on the idea of preserving family tranquility, *Perchell v. District of Columbia*, 444 F.2d 997 (D.C.Cir. 1971). The Full, Faith and Credit Clause of the Constitution does not have its ordinary potency when it is operating in the realm of family relationships, *May v. Anderson*, 345 U.S. 528 (1953). As stated by the Court in *Weber Aetna Casualty And Surety Co.*, 406 U.S. 164 (1972), "The regulation and protection of the family unit has indeed been a venerable state concern."

In the Immigration and Nationality Act, Congress has exempted large classes of aliens from the quota

system to insure family unity. Gordon and Rosenfield, *Immigration Law and Procedure,* pp. 2.84, 2.118 (1972). See Senate Report No. 748, U.S. Code Congressional and Administrative News, 1965, Vo.. 2, p. 3328, where it is stated that a purpose of a portion of the Act of 1965 was the establishment "a new system of preferential admissions based upon the existence of a close family relationship with United States citizens . . . Reunification of families is the foremost consideration. The closer the family relationship the higher the preference."

Those persons who do not adhere to the obligation of family support do not have the "good moral character" necessary to be nationalized. *In Re Nosen,* 49 F.2d 817 (D.Wash.1931); *In Re Dobric,* 189 F. Supp. 638 (D. Minn.1960); *In Re Malaszenko,* 204 F. Supp. 745 (D.N.J. 1962).

Modern psychology bears out the need for close parent-child relationships and the consequences of breakdown. See generally, Eriksen, *Childhood and Society,* (1962). For the affect of loss of parental guidance and affection see Crow & Crow, *Child Development and Adjustment,* (1962) p. 458; Bowlby, *Attachment and Loss,* Vol. I (1969) p. 206; Jersild, *Child Psychology,* (1968) p. 196.

The family relationship has found protection in the United States Constitution. As early as 1923 in *Meyer v. Nebraska,* 262 U.S. 390 (1923) the Court found the right to raise one's children to be "essential." See also *Prince v. Massachusetts,* 321 U.S. 158 (1944). *Skinner v.*

Oklahoma, 316 U.S. 535 (1942) protected the right to conceive children and *Levy v. Louisiana*, 391 U.S. 68 68 (1968) made the scope of the family comport with the realities of biology by giving illegitimate children the right to sue on a wrongful death action for the death of a parent.

Stanley v. Illinois, 405 U.S. 645 (1972) specifically recognizes the right of a family to remain together as a right under the Due Process Clause. The Plaintiff in *Stanley.* was a father of three illegitimate children. When the mother died, the children, in a dependency proceeding, were declared wards of the State because the father of the illegitimate children was presumed to be unfit. Illinois law prevented fathers of illigitimate children from even participating in the dependency proceedings to show their desire and ability to care for the children. The Court, over a strong dissent, held this presumption to be unconstitutional. The natural affection of the father and the maintenance of a family relationship were interests that weighed heavier than some administrative benefit accruing from the State by the presumption.

The interests of the parent and child in remaining together are recognizable and subject to constitutional protection. The issue is whether the government's interests outweighs the maintenance of the family relationship.

Clearly, the consequences of deportation in regard to the American citizen children in terms of their loss of parental company and guidance outweighs any interest of the government in having their father deport-

ed from this country. As stated in *Lee Fook Chuey*, 439 F.2d at 250, once the immigrant is here the damage is already done for purposes of the government's interest.

Furthermore, all of this must be considered in light of the total absence of procedural protections for the American citizen children. As pointed out here and above, they may not be separately represented at a deportation hearing. There is a total absence of any provision for presentation of their interests in the matter, for determination of any issues relating to them, or for any measures for their protection.

For these reasons, it is submitted that the Fifth Amendment's guarantee of due process of law prohibits Petitioner's deportation.

CONCLUSION

For the reasons stated herein, Petitioner respectfully prays that this Petition For Certiorari be granted.

Respectfully submitted,
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Albert Armendariz, Sr.

CERTIFICATE OF SERVICE

I certify that on this the ____ day of September, A.D., 1973, a true and correct copy of the foregoing Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was placed in the United States Mail properly addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

United States Immigration
and Naturalization Service
P. O. Box 9398
El Paso, Texas 79984

ALBERT ARMENDARIZ, SR.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1302
Summary Calendar*

HIPOLITO MARTINEZ-MARTINEZ,
Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of the Immigration and Naturalization Service (Texas Case)

(June 11, 1973)

Before WISDOM, AINSWORTH and CLARK,
Circuit Judges.

PER CURIAM: Hipolito Martinez-Martinez petitions this court for review of a deportation order of the Immigration and Naturalization Service, pursuant to 8 U.S.C.A. § 1105a. Petitioner's deportation is predicated on Section 241(a)(13) of the Immigration and

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*Rule 18, 5th Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of N.Y., 431 F.2d 409, Part I (5th Cir. 1970).

Naturalization Act, 8 U.S.C.A. § 1251(a)(13), which provides for the deportation of any alien who

> prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law. . .

The Special Inquiry Officer found that the petitioner accepted money for assisting five aliens to illegally enter the United States during September of 1970. It was undisputed that the petitioner had entered this country as an immigrant during June of 1966. Thus, the Officer concluded that the petitioner was deportable as an alien, who within five years of entry, committed the acts described in Section 241(a)(13). The Board of Immigration Appeals affirmed the decision of the Special Inquiry Officer.

In this proceeding the petitioner challenges this determination, claiming that he originally entered this country illegally in August of 1965 and voluntarily departed the country in May of 1966, shortly before making his legal re-entry the following month. He contends that for the purposes of Section 241(a)(13) his *illegal* entry in 1965 should be considered the beginning point of the five year period.

Section 101(a)(13) of the Act, 8 U.S.C.A. § 1101(a)(13) provides:

> The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

The language of the statute will not bear the construction urged by the petitioner. Petitioner had no "lawful permanent residence" in the United States prior to June of 1966.[1] Therefore, his legal coming into the United States at that time was an "entry".[2] The

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[1] *Cf.* Section 101(a)(20) of the Act, 8 U.S.C.A. & 1101(a)(20) which provides:

> The term "lawfully admitted for permanent residence means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

[2] This is not a case where *lawful* residence is temporarily interrupted, where the promise is that "it is * * * important that the continued enjoyment of [our] hospitality once granted,

privilege of legally entering this country in 1966 could not and did not carry with it retroactive legality as to petitioner's prior illegal residence. Thus, the acts committed during September of 1970 occurred within five years of entry.

The other points raised by Petitioner do not merit discussion. The Petition for Review is

DISMISSED.

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shall not be subject to meaningless and irrational hazards." *See* Rosenberg v. Fleuti, 379 U.S. 449, 459, 83 U.S. 1804, 1810, 10 L.Ed.2d 1008 (1963).

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No. 73-456

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In the Supreme Court of the United States

OCTOBER TERM, 1973

HIPOLITO MARTINEZ-MARTINEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner, a citizen of Mexico, challenges his deportation, on the ground that the evidence that he accepted money for assisting aliens to enter the United States illegally was not clear, unequivocal, and convincing; he further contends that as an alien parent of children born in the United States his deportation is invalid, since it would require his citizen children either to submit to *de facto* deportation or to be without their father.

Petitioner is a native and citizen of Mexico, who entered the United States in June 1966 as an immigrant. On November 16, 1970, the Acting District Director of the Immigration and Naturalization Service issued an order to show cause why he should not be deported, alleging that petitioner was deportable under 8 U.S.C. 1251(a)(13), in that, within five years after entry, he

knowingly and for gain assisted other aliens in trying to enter the United States illegally. Following a deportation hearing before a Special Inquiry Officer, petitioner was ordered deported. The Board of Immigration Appeals dismissed petitioner's appeal, thereby affirming the order of the hearing examiner (R. 14-18).[1] Petitioner then sought review in the court of appeals pursuant to 8 U.S.C. 1105a. That court dismissed the petition after a review of the case and with a written opinion (Pet. App.; 480 F. 2d 117 (C.A. 5)). Petitioner has been granted a stay of deportation by the Immigration and Naturalization Service pending this Court's disposition of the case.

1. Petitioner's contention (Pet. 4-13) that there was not "clear, unequivocal, and convincing evidence" (See *Woodby* v. *Immigration Service*, 385 U.S. 276, 286) that he assisted the entry of the aliens for gain is without merit. At a deportation hearing held on November 25, 1970, five witnesses testified that on or about September 21, 1970, they met petitioner in Juarez, Mexico, and that petitioner agreed to assist them to enter the United States in return for being paid various sums of money (R. 43, 84, 101, 110-111, 120-121, 143, 145, 149). While one witness, Encarnacion Rodriquez, testified that he did not personally give petitioner any money (R. 89), he did testify that his brother was to pay petitioner for assisting him to enter the United States and that petitioner told him that the money had been

[1] "R." designates the certified administrative record of the proceedings in this case before the Immigration and Naturalization Service, which we are lodging with the Clerk.

paid (R. 84).[2] The hearing examiner disbelieved petitioner's testimony that the money he received was for travel expenses and that he received no profit from his participation in the scheme (R. 134-135). At the conclusion of the hearing the special examiner found, *inter alia*, that (R. 34-35):

> It is impossible to believe that [petitioner] acted other than under venal prompting. The testimony of the five illegal aliens, which was not impeached by the strong cross-examination on the part of counsel for the respondent, showed definitely that the respondent was paid a sum of money for the assistance furnished to each of the five in entering the United States illegally and that he expected to receive additional money from them after they had arrived in Chicago and had found work. The testimony shows that the respondent refunded part of the money, the amount of $80.00 for each of the five aliens, to be used in purchasing air transportation from El Paso to Chicago. The remainder of the money was never refunded by the respondent other than the perhaps small amounts expended in payment of taxi fares for them after they were successful in having entered El Paso illegally.

The hearing officer decided the issue correctly. Considering the testimony of all five witnesses that they paid money to petitioner, the fact that there may have been some variation in the details of the testimony does not negate the clear, unequivocal and convincing evidence that petitioner was smuggling aliens into the

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[2] On December 14, 1970, petitioner pleaded guilty in the United States District Court for the Western District of Texas to having aided and abetted three of these witnesses to elude examination and inspection by Immigration officials.

United States for profit. See *Kokkinis* v. *District Director*, 429 F. 2d 938, 941-942 (C.A. 2); *Yaldo* v. *Immigration and Naturalization Service*, 424 F. 2d 501, 503 (C.A. 6); *Rodriques* v. *Immigration and Naturalization Service*, 389 F. 2d 129, 132-133 (C.A. 3).

2. Petitioner further contends that the deportation order is invalid, since his minor citizen children would have to submit to *de facto* deportation and accompany him to Mexico or in the alternative suffer the hardship of petitioner's absence from their home (Pet. 14-21).

The fact that an alien begets children in the United States does not render him immune from deportation. See *Aalund* v. *Marshall*, 461 F. 2d 710, 714 (C.A. 5); *Tsaconas* v. *Immigration and Naturalization Service*, 397 F. 2d 946, 948 (C.A. 7); *Castillo-Lopez* v. *Immigration and Naturalization Service*, 437 F. 2d 74, 76 (C.A. 5); see also the government's responses in *Jesus Martinez-Rodriguez* v. *Immigration and Naturalization Service*, No. 73-5189, petition for a writ of certiorari pending; *Mangabat* v. *Immigration and Naturalization Service*, No. 72-6751, certiorari denied, October 9, 1973.

Moreover, petitioner may avoid the claimed hardship of family separation by taking his family with him when he departs this country. To do so would not constitute *de facto* deportation of the children, who by reason of their natural citizenship would be at liberty eventually to return to this county. See *Aalund*, *supra*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

DOJ-1973-11